

State of Colorado



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State Personnel Board

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Meeting Minutes March 1, 2004

The State Personnel Board met in special public session on Monday, March 1, 2004, at the State Personnel Board, 1120 Lincoln Street, Suite 1420, Denver, Colorado 80203.

The meeting was called to order by Chair Joyce Lottner at approximately 9:15 a.m. In addition to Ms. Lottner, Board member Diedra Garcia was present in person. Board members Elizabeth Salkind, Linda Siderius, and John Zakhem were present via telephone.

Richard Djokic, Board Director; First Assistant Attorney General Richard Forman, Board Counsel; and Jane Sprague, General Professional III, were present in person.

PENDING LEGISLATION

1. House Bill 04-1373 - A Bill for an Act Concerning Modifications to the "State Personnel System Act"
2. House Concurrent Resolution 04-1005 - Concerning Reform of the State Civil Service System
3. Senate Bill 04-131 - A Bill for an Act Concerning Modifications to the Procedures for Handling an Employment Discrimination Complaint Filed by an Employee in the State Personnel System

Ms. Lottner noted that David Kaye, Department of Personnel and Administration; Mark Schwane, Colorado Federation of Public Employees (CFPE); and N. Nora Nye, American Federation of State, County, and Municipal Employees (AFSCME), were present in the audience.

Ms. Lottner thanked Jane Sprague for being Acting Director in the two-month interim between directors, welcomed Rich Djokic as newly appointed Director, and announced that the purpose of the meeting was to discuss, review, and comment on the legislation. Mr. Djokic asked the Board members if there was any objection to making the Overview of Proposed Legislation Under HB04-1373; HCR04-1005; and SP04-131, which was prepared by Board staff, available to the public who were present at the meeting. There was no objection from the Board.

Mr. Djokic suggested that the proposed legislation and resolution represent a shift of authority to the Personnel Director, allow some authority currently enjoyed by the State Personnel Board to continue, and limit the jurisdiction of the Board in some areas, such as recruitment, selection, and promotion. The Board would retain jurisdiction over grievances, discipline, separation, appeals, and hearings. Mr. Djokic asked the Board members to consider what actions, if any, did they desire to take after consideration of the proposed legislation and how it would directly impact the authority of the Board.

Beginning the discussion of how the Personnel Director would administer the system under the proposed legislation as a historical shift from overview by the Board, Mr. Forman directed the Board to HCR04-1005, p. 11, ll. 11-15, where the bill provides that the director shall adopt rules pursuant to the Colorado Constitution concerning administration of the system, appointments and promotions, standardization of positions, compensation, and standards of performance. Ms. Garcia remarked that the intent is to have the Board remain a constitutional body and concentrate on disciplinary matters and limited grievance matters.

Grievance Matters (HB04-1373, § 24-50-123, p. 42, ll. 4-25)

Mr. Djokic then directed the Board to the section of the bill on grievance matters, which are limited to violation of an employee's rights under the federal or state constitution, the Employment Practices, the Whistleblower statute, or the grievance procedures themselves. It was also noted that the grievance process had been shortened to 30 days for the Board to "review and summarily grant or deny a petition." Ms. Salkind said that she was not in favor of limiting the Board's authority on grievances. Ms. Garcia disagreed, stating that grievances of all kinds are received, and the Board's time is better spent on matters involving pay, tenure, and status, even though there are a small percentage of cases that should be heard from grievances. Ms. Salkind responded that the grievance process is an avenue to pursue that is independent and a way to avoid going to civil court. Mr. Forman remarked that the proposal limits review to issues involving relatively more serious matters.

Mr. Zakhem stated that employees want the Board to continue reviewing grievances, the Board has no problem reviewing grievances, and having the ability to monitor them is good. Ms. Siderius remarked that, looking at all perspectives, setting some parameters might discourage frivolous grievances, but more time is needed than a 30-day time limit to grant or deny a grievance petition. Ms. Garcia noted that the proportion of grievances petitions for which a hearing is granted is small. Mr. Kaye explained that

the thinking behind reducing the time frame to 30 days was that 80% of grievance petitions are denied, but the bill attempts to capture the 20% that are not denied. Screening the grievances in a 30-day time period will bring balance to the process and cause the Board to meet the more serious allegations quickly. On behalf of CFPE, Mr. Schwane spoke to the value to the Board in setting its own jurisdiction and determining what it wants to review or not review. The bill abdicates power to the executive branch as to who should decide what to review. Ms. Garcia responded by saying she personally objects to removal of power, since the Board is set up to protect property rights of employees, but grievances are internal issues.

Mr. Zakhem made a motion to support HB04-1373 regarding review of grievances, § 24-50-123, p. 42, ll. 4-25, with the amendment that the Board may review and grant or deny a petition within ninety (90) days, rather than thirty (30) (line 23). Ms. Garcia seconded the motion. The motion passed on the affirmative vote of Ms. Garcia, Ms. Siderius, and Mr. Zakhem. Ms. Salkind and Ms. Lottner voted in opposition to the motion.

Rulemaking (HCR04-1005, Section 14 (4), p. 11, ll. 6-15)

In response to Mr. Zakhem's inquiry about a Type 1 transfer, Mr. Forman stated that budgetary and administrative matters go to DPA, and the impact is that the Personnel Director makes rules. Mr. Kaye explained that this section is a technical cleanup and that the Personnel Director's rules have historically been termed, "procedures." It needs to be clear that rules must be adopted pursuant to the Administrative Procedure Act (APA) and that the procedures have the force and effect of law. For the last 30 years, the Personnel Director has been administering the system, so this is a constitutional recognition of what has been going on for 30 years with regard to appointments and promotions, standardization of positions, compensation, and standards of performance. Ms. Salkind and Ms. Garcia expressed that they were not in favor of losing the Board's role of oversight; Mr. Zakhem stated that the rules currently in place would be subject to redoing by the Personnel Director, thus abrogating the Board's authority, which is not what the voters wanted based on the Board's responsibility to the state.

Mr. Kaye suggested that the Board analyze what power is being shifted, that is, how people come in and move through the personnel system, and decide which issues the Board wants to maintain authority over. Ms. Garcia responded that it's the Board's job to oversee the personnel system and not lose authority. Mr. Kaye stated that there is overlap between what the Personnel Director does and what the Board does as far as job evaluation, compensation, standards of performance. Mr. Djokic remarked that based on the proposed constitutional amendment, the Board would have no say on standards of performance and pay. Mr. Kaye then stated that the amendment preserves the Board's jurisdiction over cases of property rights. Ms. Siderius said that this goes to a fundamental evaluation of the Board's role - is the Board going to be involved in policy-making? The Board's power is solely in adjudicatory arena - there is a problem with making the system subject to the whims of an administration that is in place. Mr. Schwane stated that rulemaking is the role of the Board and the merit

system protects against patronage. In abdicating rulemaking, the Board as the oversight body is suffering a loss of oversight. Mr. Kaye stated that the Board never made rules on privatization, for example, so why does it want to make policy? Ms. Garcia said that the Board's role as adjudicator must not be compromised, and the Board would be in the position of approving the Personnel Director's rules by being the enforcer of those rules. Mr. Forman advised that currently the Board has overall rulemaking authority and the proposal is to shift this authority constitutionally to the Personnel Director, which is a bifurcation of rulemaking authority. Ms. Nye testified that the Board has historically held the dual role of policy-making and adjudicatory authority and that AFSCME Council 76 opposes this shift. Ms. Garcia added that the commission had gone to great lengths to get feedback from the employee organizations.

Ms. Lottner referred the Board to HCR04-1005, p. 10, l. 20 *et seq.*, regarding the Board's rulemaking authority. Mr. Kaye stated that these were housekeeping changes and that the power to adopt rules includes the power to amend or repeal rules. Mr. Zakhem posed the question of what does the Board want to say to the General Assembly as far as advising them of the Board's position on this issue. Mr. Forman remarked that the rulemaking language removes certain areas of rules the Board currently has authority over and transfers the authority to the Personnel Director. Ms. Siderius stated that the Board's role in policy and oversight is not in rulemaking in these areas and that agencies must implement the rules properly.

Ms. Garcia moved that the Board remain neutral on the issue of the shift of rulemaking authority, as proposed in HCR04-1005. Mr. Zakhem seconded the motion. The motion passed on the affirmative vote of Ms. Garcia, Ms. Siderius, and Mr. Zakhem. Ms. Salkind and Ms. Lottner voted in opposition to the motion.

Employ or authorize ALJs (HB04-1373, § 24-50-103, p. 16, l. 15, and § 24-50-139, p. 45, ll. 8-12)

Ms. Salkind stated that she strongly opposes the language in § 24-50-103, because the Board loses the ability to employ and control ALJs. Mr. Forman pointed out that the repealed section, § 24-50-139, already uses the terminology, "authorize." Mr. Kaye stated that there were three points to be made here: the statute eliminates two references to ALJs and puts this subject in one place, the Board can hire or delegate authority to hire, and the APA will be followed. There is no intent to narrow the Board's authority to hire ALJs with this language. Mr. Djokic stated that the ALJs are bound by the APA. Ms. Lottner asked what the Board wanted to do with this language, and the Board discussed ALJs in terms of contracting, employing, managing caseloads as an efficiency, and the fact that the Board must have authority to hire, contract, etc. Mr. Kaye stated that the intent of the language was to empower the Board to do all three.

Ms. Garcia moved that the language, "The board may authorize administrative law judges," be replaced with the language, "The board may employ, contract, or otherwise authorize administrative law judges, etc." Ms. Salkind seconded the motion. The

motion passed on the affirmative vote of Ms. Garcia, Ms. Salkind, Ms. Siderius, Mr. Zakhem, and Ms. Lottner.

Decisions modified or reversed (HB04-1373, § 24-50-103, p. 16, ll. 7-14)

Ms. Salkind stated that the effect of the remedy of "placing the employee in the same situation he or she would have been in if the procedural requirements had been satisfied," would be drastic and would place the Board in the position of deciding procedural versus substantive matters. Mr. Kaye stated the intent was to separate substance from process and the employee loses no pay, tenure or status in the interim. The case of an incomplete investigation where a manager failed to use reasonable diligence to find evidence is one example. Ms. Garcia cited to an example of an employee in Corrections who was stealing but had to be rehired due to a procedural problem.

Ms. Garcia moved that the Board not support this component regarding reversals and modifications. Ms. Salkind seconded the motion. Ms. Salkind seconded the motion. The motion passed on the affirmative vote of Ms. Garcia, Ms. Salkind, Ms. Siderius, and Ms. Lottner. Mr. Zakhem voted in opposition to the motion.

Ms. Lottner directed Mr. Djokic to go to the House Committee on this legislation on March 2, 2004, accompanied by Ms. Sprague, and present the Board's position thus far. It was also decided that the pending legislation would be placed on the agenda for the regular monthly meeting in March. Mr. Forman reminded the Board members that they need to be aware that depending on what support is generated for the legislation, things can move very fast or get bogged down. Ms. Lottner asked Mr. Djokic to keep the Board informed in writing, and Ms. Garcia stated that the Board needed DPA's input for the future consideration of issues.

Mr. Zakhem moved to adjourn the meeting. Ms. Garcia seconded the motion. The motion passed on the affirmative vote of Ms. Garcia, Ms. Salkind, Ms. Siderius, Mr. Zakhem, and Ms. Lottner.

APPROVED THIS 20th DAY OF APRIL, 2004.

Joyce Lottner, Chair

John Zakhem, Vice Chair

Diedra Garcia, Member

Elizabeth Salkind, Member

Linda Siderius, Member